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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 781

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT DANE TRAILERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 79–87) is reported at 363 F. 2d 130. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 15–28, 39–41) are reported at 150 NLRB 438.

JURISDICTION

The decision of the court of appeals was rendered on June 24, 1966, and a decree was entered on July 21, 1966 (R. 79, 88). By orders dated September 21 and October 20, 1966, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 18, 1966 (R. 89, 90). The petition was filed on November 11, 1966, and was

granted on January 9, 1967 (R. 91). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

An employer denied accrued vacation pay to those of its striking employees who had failed to return to their jobs by a certain date or had been previously replaced, but awarded such pay to all non-strikers and strikers who had abandoned the strike earlier. The question presented is whether the Board properly held that this conduct violated Section 8(a) (1) and (3) of the National Labor Relation. Act, in the absence of specific evidence that the employer had a subjective intent to discriminate against the strikers or interfere with strike activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Company, a manufacturer and seller of truck trailers at Savannah, Georgia (R. 8, 6), had a collective bargaining agreement with the Union,[1] which provided that employees with more than 60 days' service would receive vacation pay on the Friday nearest July 1 each year (R. 66–67). Employees who worked a total of 1,525 hours during the year qualified for the maximum pay specified in the contract;[2] those who worked fewer hours (down to 169 hours) were awarded proportionately lower benefits, according to a contract schedule (R. 65–66). The contract also provided that "[i]n case of lay-off, termination or quitting, an employee who has served more than sixty (60) days shall receive pro rata share of vacation" pay (R. 67).[3] There was no requirement that employees had to be at work on July 1 to qualify for such benefits.

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[1] Local 26, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

[2] Such maximum pay was, for employees with continuous employment of one to five years, the equivalent of pay for 40 hours of work at existing wage rates; and, for employees with more than five years' continuous service, the equivalent of such pay for 80 hours of work (R. 65–66).

[3] Plant Manager Granger confirmed (R. 76) that employees who were discharged or quit for reasons of their own were paid their accrued vacation pay.

This contract was effective until March 31, 1963, and thereafter from year to year unless terminated by notice of either party (R. 16, 68–69). On April 30, 1963, following a temporary extension of the contract, the Union gave the Company timely notice of its intention to terminate the contract as of May 16, 1963. On that date, the Union began an economic strike in support of new contract demands, which was joined by about 350 of the Company's 400 employees (R. 17, 43, 48, 49, 62, 70). By July 1, about 260 strikers had been replaced, and some had returned to work. Thereafter the Company continued to hire replacements, and the strike was formally terminated on December 26, 1963 (R. 17, 59–60, 63–64, 73–74).

Meanwhile, on July 12, some 300 strikers requested their "earned vacation pay" from the Company (R. 17, 48, 49–50, 55, 63, 69, 71–72). All had worked a sufficient period in the year preceding July 1 to qualify for such pay under the provisions of the prior contract; many had been in the Company's employ from 3 to 15 years and had received vacation pay in the past (R. 17, 22, 47–48, 50–51, 52–53, 54–55, 71–72). The Company replied that, since the Union had terminated the contract, no provision for vacation pay was in effect; the Company added that it would be happy to discuss the matter of vacation pay at the bargaining table (R. 17–18, 72–73). Shortly thereafter, however, the Company made vacation payments (1) to all employees who qualified under the prior contract and had not participated in the strike and (2) to qualified striking employees who had returned to work be-

fore July 1 and had not been replaced (R. 18, 60–61). But the Company denied accrued vacation pay to all strikers who had remained on strike beyond July 1 or had been replaced prior to that date, even though they satisfied the contract requirements for such pay (R. 17, 22, 61, 75–76).

At the hearing before the Board, a Company official testified that these payments were not made pursuant to the prior contract, but in accordance with a "policy" embodying "substantially the same" provisions (R. 18, 64). The Company gave various explanations for its refusal to make similar vacation payments to strikers who had been replaced or who had not abandoned the strike by July 1: (1) there was a "break in the length of service"; (2) these employees "were not working as of July the 1st"; and (3) "they were replaced and discharged * * * they were not employees of ours" (R. 18, 23, 61).

B. THE BOARD'S DECISION AND ORDER

Upon the foregoing facts, the Board concluded that, by denying accrued vacation pay to strikers who had not abandoned the strike by July 1 or had previously been replaced, the Company discriminated against them because of their adherence to the strike, in violation of Section 8(a) (1) and (3) of the Act (R. 39–40). The Board held that the strikers were entitled to "be treated uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship" (R. 40). The Board ordered the Company to cease and desist from

its unfair labor practices and to reimburse strikers for vacation pay unlawfully withheld from them (R. 25–27, 41).[4]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals refused to enforce the Board's order. It held that the Company's disparate treatment of strike adherents, on the one hand, and non-strikers and those abandoning the strike at an early date, on the other, did not, without more, violate Section 8(a) (1) and (3) of the Act. It construed this Court's decision in *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, as establishing "that if the 'employer's conduct' carries with it *any other* reasonable inferences of a *legitimate motive*, the inference of illegality does not control" (R. 85, emphasis in original). While recognizing that "the record does not reveal any such alternative motives," the court found "it reasonable to infer that the Company might have acted (1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods" (*ibid.*). Accordingly, it concluded that there was no "circumstantial evidence on which to base an inference of improper motive," and thus that the Board's decision had no support in the record (R. 87).

[4] The Board's order does not award vacation pay to the strikers for any period in which they were on strike; the amount is to be determined on the basis of the hours and days actually worked prior to the strike (R. 40, n. 2).

ARGUMENT

UNDER THE RULE OF *ERIE RESISTOR*, THE BOARD CORRECTLY RULED THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY DENYING ACCRUED VACATION PAY TO STRIKERS WHO CONTINUED TO STRIKE BEYOND A CERTAIN DATE, OR WERE REPLACED BY THEN, WHILE AWARDING SUCH PAY TO OTHER EMPLOYEES

A. INTRODUCTION AND SUMMARY

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which includes the right to strike.[5] Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization," which includes discouraging participation in concerted activities.[6] As we show below (pp. 10–14), the Company's denial of accrued vacation benefits to those of its employees who remained out on the strike called by the Union beyond a certain time, while granting such benefits to non-strikers and strikers who abandoned the strike before that time, necessarily discriminated against employees on the basis of their strike activity, and thus tended to interfere with, restrain, and discourage such activity. The basic question presented is whether the Company's

[5] The Act's solicitude for the right to strike is further shown by Section 13, which provides that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *."

[6] *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233; *Radio Officers'* v. *National Labor Relations Board*, 347 U.S. 17, 39–40.

action was nonetheless lawful because of the absence of any showing that it was motivated by a subjective intent to penalize the strikers for their strike activity.

The governing principles were recently articulated by this Court in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. There, the Board had found that the employer discriminated against striking employees, in violation of Section 8(a) (1) and (3), by awarding super-seniority to replacements and to strikers who had abandoned the strike and returned to work. The Court upheld the Board's finding of an unfair labor practice, even though there was no specific evidence of subjective intent to discriminate against the strikers and the employer claimed his action was essential to enable him to continue operating.

Quoting from prior decisions,[1] the Court pointed out that, although it was important to show "the employer's intent or motive to discriminate or to interfere with union rights," "specific evidence of such subjective intent is 'not an indispensable element of proof of violation.' * * * 'Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference' " (373 U.S. at 227). The Court added that, "when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself," the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions

[1] *Radio Officers'* v. *National Labor Relations Board*, 347 U.S. 17, 44; *Teamsters Local 357* v. *National Labor Relations Board*, 365 U.S. 667, 675.

as something different than they appear on their face, an unfair labor practice charge is made out" (*id.*, at 228). Moreover, even where "the employer * * * claim[s] that his actions were taken * * * not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act," the Court recognized that "[n]evertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended" (*ibid.*, emphasis in original). Accordingly, the Court concluded that "such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task * * * of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct" (*id.*, at 228–229). And " 'the function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review' " (*id.*, at 236).[8]

Applying these principles here, we shall show that: (1) the Company's policy in regard to vacation pay inherently discriminated against those strikers who adhered to the strike; (2) both the Company's asserted business justification and the justification

[8] Quoting from *National Labor Relations Board* v. *Truck Drivers Local 449*, 353 U.S. 87, 96.

supplied by the court below were insufficient to outweigh the injury to employee rights affected by the discrimination; and thus (3) the Board properly found a violation of the Act even though there was no showing that the Company had a subjective intent to penalize the employees because of their continued strike activity. Finally, we shall show that this conclusion is consistent with *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, which the court below erroneously relied upon, and that that decision in no way modified the sound principles enunciated in *Erie Resistor.*

B. THE COMPANY'S VACATION PAY POLICY NECESSARILY DISCRIMINATED AGAINST THOSE EMPLOYEES WHO WENT OUT, AND REMAINED, ON STRIKE

As set forth in the Statement (*supra,* pp. 4–5), on May 16, 1963, about 350 of the Company's 400 employees went out on strike in support of the bargaining demands of their union representative. In July, about 300 strikers requested the Company to give them the vacation pay which they had earned, through work performed prior to the strike, under the collective agreement which had been effective until May 1, 1963. Although these strikers had worked a sufficient period to satisfy the contract requirements for vacation pay and such pay had been earned during a period when the contract was indisputably in effect, the Company refused the strikers' request on the ground that, since the contract had been terminated, it was no longer obligated to make vacation pay-

ments. Nevertheless, shortly thereafter, the Company awarded vacation pay to all the employees who had not gone out on strike and to those strikers who had not been replaced and had returned to work before July 1. This was allegedly done pursuant to a "policy" embodying "substantially the same" provisions as the expired contract.

Clearly, this policy, by its very nature, discriminated against strikers and impaired the right to strike sufficiently to render a specific showing of unlawful motive unnecessary. The policy treated non-strikers and strikers who were not replaced and returned to their previous positions before July 1 differently from strikers who adhered to the strike and did not so return by that date; the former got the vacation pay which they had earned, prior to the strike, under the old contract, but the latter did not. Since the only difference between the two groups was that the favored class either did not strike or abandoned the strike early, whereas the non-favored class continued to adhere to the strike, their disparate treatment obviously turned on the exercise of the right to strike. As *Erie Resistor* makes clear, the Act prohibits such discriminatory treatment based upon participation in a lawful strike.[9]

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[9] The Company contends that the policy did not "discriminate against employees who exercised their right to strike" because "vacation pay was awarded to striker and non-striker alike" (Opp. to Pet. for Cert., p. 7). However, the only strikers who received such pay were those who were not replaced and returned to their previous positions before July 1; all strikers who were replaced before July 1 or who remained on strike after that time were penalized. Thus, here, no less

It is irrelevant that the Company's policy did not expressly distinguish between non-strikers and strikers who returned early, on the one hand, and employees who continued to strike, on the other. The policy, though phrased in neutral terms, necessarily operated so as to penalize *only* those employees who struck and were replaced or did not return to their jobs by July 1.[10] The Company obviously was aware that

than in *Erie Resistor Corp.*, *supra*—where super-seniority was awarded to returning strikers but not to those who remained on strike—the line was drawn on the basis of whether an employee exercised the right to continue to engage in a strike.

[10] There is no showing that any non-striker who had earned vacation pay was deprived thereof under the Company's policy because, for reasons unrelated to the strike, he happened to be absent from work on July 1. But even if this were the case, it would not exonerate the Company's punitive action against those who were away from work on July 1 because they were continuing to exercise their right to strike. The mere fact that others who are not engaging in Section 7 activity may be subjected to the same disability as the strikers does not lessen the interference with the strikers' Section 7 rights. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (plant rule prohibiting all solicitation and literature distribution on company property cannot be applied to bar union activity during non-working time, though the rule predated the arrival of the union and had been impartially enforced to preserve plant discipline and prevent littering and pilfering); *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9 (established plant rule forbidding employees from leaving their work without permission of the foreman cannot be applied to bar a concerted walkout over poor working conditions, protected by Section 7).

We are mindful of *Pittsburgh-Des Moines Steel Co.* v. *National Labor Relations Board*, 284 F. 2d 74 (C.A. 9); *National Labor Relations Board* v. *Community Shops*, 301 F. 2d 263 (C.A. 7); *Quality Castings Co.* v. *National Labor Relations Board*, 325 F. 2d 36 (C.A. 6); and *National Labor Relations Board* v. *National Seal*, 336 F. 2d 781 (C.A. 9)—holding that

strike adherents would be the victims of a "policy" against awarding vacation pay to persons "who were not working as of July the 1st" or who had been "replaced and discharged" (*supra,* p. 5). The Company knew that it had replaced about 260 strikers before July 1 and that, just prior to making the vacation payments, it had received letters indicating that about 300 persons were still on strike as of that date (*supra,* p. 4). In short, as the Board concluded (R. 23), "[s]tripped to its essentials" the Company's conduct was designed "to retaliate against the strikers for having engaged in this concerted activity."

Moreover, as the Board further ruled (R. 23), "the natural and foreseeable consequence" of this discrimination was to discourage the Company's employees from engaging in strike activity. Although the Company did not deny vacation pay as a means of "breaking" the 1963 strike (see Opp. to Pet. for Cert. pp. 3, n. 6; 6), the fact remains that those employees who continued to strike beyond July 1 or had been replaced by then were deprived of substantial monetary benefits which they had earned before the strike (see *supra,* p. 3 and n. 2). A denial of such accrued benefits to striking employees merely because they adhered to the

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the employer did not violate the Act by counting time spent on strike in determining whether strikers were qualified to receive bonuses or other employment benefits contingent upon working a certain period of time. Although the reasoning of some of these decisions is inconsistent with the analysis just suggested, the results in those cases may all be explained on the ground that, on balance, the court was of the view that the prejudice to employee interests from the particular policy involved was slight and outweighed by the business interest which it served. As we show *infra,* pp. 14–17, this is not true here.

strike would necessarily tend to discourage them and others from supporting strike activity in the future. To impose such a risk upon employees who exercise the right to strike is totally incompatible with the "deference paid the strike weapon by the federal labor laws." *Erie Resistor Corp., supra,* 373 U.S. at 235.

In sum, here, as in *Erie Resistor,* the Company's "conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended" (373 U.S. at 228, emphasis in original).[11]

C. THE DISCRIMINATION WAS NOT JUSTIFIED BY ANY OVERRIDING BUSINESS PURPOSE

1. The Company advanced various reasons for denying accrued vacation benefits to the strikers who, before July 1, had not returned to work or had been replaced. As the court below itself recognized in concluding that "the record does not reveal any such

[11] The factual differences between Erie Resistor's super-seniority plan and respondent's vacation pay policy are immaterial here. While it may be that Erie's plan had a more substantial effect on its employees, in light of its continuing impact, respondent's asserted justifications, and those conjectured by the court below (*infra*, pp. 14–17), are not nearly as strong as Erie's—*i.e.*, that the super-seniority plan was needed to enable it to attract replacements and thus to keep its plant in operation. Moreover, while it appears that a number of Erie's long-term employees who struck were not adversely affected by the super-seniority plan (see Brief for the National Labor Relations Board, No. 228, O.T. 1962, p. 15), *all* of respondent's employees who were replaced before July 1 or who were still on strike by then were deprived of vacation benefits other employees obtained.

[legitimate] motives" (R. 85), none of these reasons affords any valid justification for the Company's action.

In response to the strikers' letters requesting vacation benefits, the Company stated that, since the contract had been terminated, it was no longer obligated to pay such benefits (*supra,* p. 4). But, since the benefits had accrued before such termination, the termination did not eradicate the Company's past liability. Moreover, the Company did, in fact, pay accrued vacation benefits to its other employees, under a "policy" embodying "substantially the same" provisions as the prior contract (*supra,* p. 5).

2. Before the Board, the Company sought to justify its action on other grounds. It asserted that the benefits were denied to employees still on strike as of July 1 because they were not at work on that day and that the benefits were denied to strikers who had been replaced because they were either no longer "employees of ours," or had a "break in the length of service" [12] (*supra,* p. 5). But none of these considerations was relevant under the contract, and the Company's policy admittedly adopted the contract's vacation pay provisions.

The contract did not require an individual to be at work or to have employee status as of July 1 to be eligible for vacation pay. On the contrary, it specifically provided that any employee who had worked more than 60 days was entitled to a *pro rata* share of

[12] Some of the strikers who were replaced prior to July 1 returned to work after July 1, apparently as new employees (R. 17, n. 4; 61).

vacation pay, even "in case of lay-off, termination or quitting" prior to July 1 (R. 67), and Plant Manager Granger confirmed that such payments had been made to employees in that category (R. 76). Similarly, continuity of service was a factor under the contract only in determining *how much* vacation pay an employee (with more than 60 days' service) would receive;[15] it was irrelevant in determining his *eligibility* to receive any payments at all. Moreover, whatever their validity, none of these explanations reflects "an overriding business purpose justifying the invasion of union rights." *Erie Resistor Corp., supra,* 373 U.S. at 231.

3. Nor can the Company's action be justified by the reasons which the court below "inferred"—*i.e.,* "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods" (R. 85). In the first place, these reasons were not advanced by the Company. As this Court noted in *Erie Resistor Corp., supra,* 373 U.S. at 228, it is the employer's obligation "to explain away" his inherently discriminatory conduct; "if he fails * * * an unfair labor practice * * * is made out." Not only is the employer in the best position to know what prompted his action, but for the court to substitute reasons different from those he gave precludes the Board from exercising its primary responsibility of balancing the conflicting interests involved (*id.* at 236).

[15] Thus employees with more than 5 years' continuous service received double the vacation benefits of employees with shorter tenure (R. 65–66).

In any event, there was no basis for the court's suggestion that the Company's purpose in denying accrued vacation pay to the strikers not at work on July 1 was to discourage early leaves before vacations or to encourage longer tenure. The Company's own action refutes the first suggestion, for, even assuming it is proper to view striking as taking "early leave," it did grant vacation pay to some strikers who took such "leaves"—*i.e.*, those who abandoned the strike and returned to their former positions before July 1. And a policy which results in a total forfeiture of earned monetary benefits because of absence from work on the very day the benefits are payable would hardly tend to encourage long tenure. The other justification supplied by the court—a desire to reduce expenses—could not possibly excuse placing the total burden of the cost saving on those employees who were adhering to the strike.

In sum, the Company's action of denying accrued vacation benefits to strikers who did not return to work, or had been replaced, before July 1 was justified by no business purpose which could outweigh the discriminatory and other deleterious effects of that action on the employees' protected right to strike. Accordingly, under the principles of *Erie Resistor, supra,* the Board properly concluded that the Company violated Section 8(a) (1) and (3) of the Act, even without specific proof that it had a subjective intent to discriminate against strikers or interfere with union activity.

D. THE *AMERICAN SHIP* DECISION DID NOT MODIFY THE PRINCIPLES OF *ERIE RESISTOR*

In holding that the Company did not violate the Act, the court below did not even cite *Erie Resistor*. Instead, it relied upon certain language in *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, which it read as, in effect, qualifying the basic principle of *Erie Resistor*.[14] It is plain, however, that the court of appeals misconstrued *American Ship* and that that case does not modify *Erie Resistor*.

The holding in *American Ship* was that Section 8(a) (1) and (3) of the Act does not bar an em-

[14] The court also relied, erroneously, upon *Bi-Rite Foods, Inc.*, 147 NLRB 59 (R. 86). In *Bi-Rite*, the Board held that the employer neither violated his duty to bargain in good faith nor improperly interfered with the employees' right to strike when, after an impasse in bargaining occurred and the union called a strike, he announced that he would put into effect the wage, holiday, and vacation offer which had previously been made to, and rejected, by the union. It is well settled that an employer does not disparage the employees' union representative where, after an impasse in the bargaining is reached, he unilaterally puts into effect the *same* benefits which were previously offered to, but rejected, by the union. See *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217, 224–225. In the present case, however, the Company's unilateral policy with regard to vacation benefits differed in material respects from the provisions of the prior contract, and there was no prior bargaining about the changes (R. 63–64). As shown, the contract provisions, unlike the Company's new policy, neither required that an employee be at work, or in the company's employ, on July 1 in order to receive accrued vacation benefits, nor discriminated against strikers.

ployer from locking out his employees after an impasse in bargaining negotiations had occurred, to advance his bargaining position. Prior to reaching this conclusion, the Court recounted some relevant general principles developed in prior decisions. As part of this background review, the Court, in discussing the situations in which specific evidence of an intent to discourage union membership or activity had been dispensed with, stated (380 U.S. at 311–312): "In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."

The court below, emphasizing the phrase "so compelling," construed this sentence as meaning that, should the reviewing court find that "the 'employer's conduct' carries with it *any other* reasonable inference of a *legitimate motive*, the inference of illegality" otherwise flowing from the inherently discriminatory nature of the employer's conduct "does not control" (R. 85, emphasis in original). But, the opinion in *American Ship* as a whole shows that the sentence relied on by the court below was referring to a situation where the employer was in fact motivated by anti-union considerations and his assertion of an innocent purpose was therefore a mere pretext.[15] This Court plainly was not suggesting that where, as here and in

[15] Thus, the Court explained (380 U.S. at 312), "where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."

Erie Resistor, there is no evidence of anti-union motivation but the employer's action is nonetheless inherently discriminatory, such action would be lawful if there is any reasonably inferrable legitimate motive therefor. On the contrary, with reference to the latter situation, the Court in *American Ship* specifically recognized that the Board has the responsibility to weigh "'the interests of employees in concerted activities against the interest of the employer in operating his business in a particular manner'" (380 U.S. at 312, quoting from *Erie Resistor*).[16] The Board correctly performed that function here, and its order, therefore, should have been enforced.

[16] Nor does the Court's actual holding in *American Ship* reflect a rejection of this principle; the Court simply found it was inapplicable to the conduct there involved. Thus, the Court found that the employer's action in bringing economic pressure to bear in support of his bargaining position was not "in any way inconsistent with the right to bargain collectively or with the right to strike," nor did it "carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such" (380 U.S. at 310, 312).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

Respectfully submitted.

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